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Javad Safikhani v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO
K-05-84-03 OF 2015(IRN)
TENGKU MAIMUN, ABDUL RAHMAN SEBLI AND ZABARIAH
MOHD JJCA
22 JANUARY 2017

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant charged with offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under s 39B(2) of the same Act — Whether learned judicial commissioner failed to give maximum evaluation of testimony of prosecution's witnesses — Whether there was break in chain of evidence — Whether adverse inference under s 114(g) of the Evidence Act 1950 should have been invoked for failure to call material witness — Dangerous Drugs Act 1952 s 39B(1)(a) & 39B(2)

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The appellant was charged with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under s 39B(2) of the same Act. The prosecution's case was that, during a police road block conducted by the police led by PW2 at Jalan Alor Merah, Alor Setar, Kedah, the police stopped a taxi which was driven by PW9. The appellant was a passenger of the said taxi. Upon further search, PW2 found two boxes of 'Kellogs Cornflakes' which contained dangerous drugs. During the trial, it was the evidence of PW2 that there were more than two boxes seized from the appellant but he had no idea what happened to those missing boxes. Nevertheless, Const Izzwan Md Isa ('PW4') insisted that they only seized two boxes and he denied vehemently that there were more than two. It must be noted that, based on the evidence, it was found that PW4 and Const Akmal bin Abdul Nasir who had been instructed by PW2 to keep watch over the seized item had taken some of the exhibits and sold it in the open market. The investigating officer ('PW6') also confirmed that several police personnel who were involved in the road block had been suspended from duty in relation to the missing exhibits. In defence, the appellant submitted that there were more than two boxes seized during the road block. The appellant further submitted that there was a break in chain of custody of the suspected drug exhibits and the suspected drug exhibits had been tampered with.

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Held, allowing the appeal; setting aside the conviction and sentence; and acquitting and discharging the appellant:

- (1) Since PW2 and PW6 had confirmed that there were missing exhibits, and that several police personnel had been suspended from duty in relation to the 'missing exhibits', then PW4 was not telling the truth as to the number of boxes seized on that day. Hence PW4's credibility left much to be desired. This aspect of the evidence of the prosecution's witnesses was never considered by the learned judicial commissioner ('the JC'). There was no proper evaluation by the JC on the testimony of the prosecution witnesses vis a vis PW2, PW4 and PW6. Therefore the finding of the learned JC was erroneous (see para 25). A B
- (2) In consideration of the doubt created as to how many boxes were seized from the appellant, Const Akmal bin Abdul Nasir and Const Sivanesan a/l Subramaniam, who were on duty at the police road block, were crucial and material for the prosecution's case. The failure to call these witnesses created material gaps and doubts in the prosecution's case which was fatal to the prosecution's case and an adverse inference under s 114(g) of the Evidence Act 1950 should have been invoked against the prosecution's case (see paras 26–27 & 37). C D
- (3) The issue of tempering and missing exhibits had been raised from the initial stage of the prosecution's case, it was thus incumbent upon the prosecution to disprove such notions. It cannot be brushed aside and totally ignored, as was what had happened in the present case. The learned JC had failed to take into account the above factors which were crucial as it raised doubts on the identity of the drugs. A maximum evaluation of the testimony of the prosecution's witnesses especially PW4 created doubt on the credibility of the prosecution's witnesses and the identity of the exhibits, of which defence of the case should not have been called in the first place. In totality, the learned JC had erred in his findings that there was no break in the chain of custody of the exhibits (see paras 33–34 & 36). E F

[Bahasa Malaysia summary G

Perayu dipertuduh atas kesalahan bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum bawah s 39B(2) Akta yang sama. Kes pendakwaan adalah, semasa satu sekatan yang dikendalikan oleh polis yang diketuai oleh PW2 di Jalan Alor Merah, Alor Setar, Kedah, polis menghentikan teksi yang dipandu oleh PW9. Perayu adalah penumpang teksi tersebut. Selepas carian lanjut, PW2 menemui dua kotak 'Kellogs Cornflakes' yang mengandungi dadah berbahaya. Semasa perbicaraan, PW2 memberi keterangan bahawa terdapat lebih daripada dua kotak yang dirampas daripada perayu tetapi dia tidak tahu apa yang berlaku pada kotak-kotak yang hilang tersebut. Walau bagaimanapun, Konst Izzwan Md Isa ('PW4') menegaskan bahawa mereka hanya merampas dua kotak dan dia dengan tegas menafikan bahawa terdapat lebih daripada dua kotak. Berdasarkan keterangan didapati bahawa PW4 dan Konst Akmal bin Abdul Nasir yang diarahkan oleh PW2 untuk mengawasi H I

- A item yang dirampas telah mengambil beberapa ekshibit dan menjualnya di pasaran terbuka. Pegawai penyiasat ('PW6') juga mengesahkan bahawa beberapa anggota polis yang terlibat dalam sekatan jalan digantung daripada tugas akibat ekshibit yang hilang. Dalam pembelaannya, perayu menghujahkan bahawa terdapat lebih daripada dua kotak yang dirampas
- B semasa sekatan jalan. Perayu menghujahkan lagi bahawa terdapat keputusan dalam rangkaian keterangan berkaitan jagaan ekshibit dadah kerana ekshibit dadah disyaki telah diganggu.
- C **Diputuskan**, membenarkan rayuan itu; mengetepikan sabitan dan hukuman; dan melepaskan dan membebaskan perayu:
- (1) Memandangkan PW2 dan PW6 telah mengesahkan bahawa terdapat ekshibit yang hilang, dan bahawa beberapa anggota polis telah digantung dari tugas berhubung dengan 'ekshibit yang hilang', maka PW4 tidak bercakap tentang bilangan kotak yang disita pada hari tersebut. Oleh itu, kredibiliti PW4 amat lemah. Aspek keterangan saksi pendakwa ini tidak pernah dipertimbangkan oleh pesuruhjaya kehakiman ('PK'). Tiada penilaian wajar oleh PK tentang keterangan saksi pendakwa berbanding PW2, PW4 dan PW6. Oleh itu, penemuan PK adalah terkhilaf (lihat perenggan 25).
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- (2) Sebagai pertimbangan terhadap keraguan yang dibuat tentang berapa banyak kotak yang dirampas daripada perayu, Konst Akmal bin Abdul Nasir dan Konst Sivanesan a/l Subramaniam, yang bertugas semasa sekatan jalan, adalah penting untuk kes pendakwaan. Kegagalan memanggil saksi-saksi ini mewujudkan jurang dan keraguan dalam kes pendakwaan yang seterusnya menjejaskan kes pendakwaan dan anggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 sepatutnya dibangkitkan terhadap kes pendakwaan (lihat perenggan 26–27 & 37).
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- (3) Isu usikan dan kehilangan ekshibit telah dibangkitkan dari peringkat awal kes pendakwaan. Oleh itu, menjadi tanggungjawab pihak pendakwaan untuk membantah pendapat sedemikian. Ini tidak boleh diketepikan dan diabaikan sama sekali, seperti apa yang berlaku dalam kes ini. PK gagal mengambil kira faktor-faktor di atas yang penting kerana ini menimbulkan keraguan tentang identiti dadah. Penilaian maksimum keterangan saksi pendakwa terutamanya PW4 menimbulkan keraguan tentang kredibiliti saksi pendakwa dan identiti ekshibit, yang mana pembelaan tidak sepatutnya pun dipanggil. Secara keseluruhannya, PK terkhilaf dalam penemuannya bahawa tidak ada keputusan dalam rangkaian keterangan berkaitan jagaan ekshibit (lihat perenggan 33–34 & 36).]
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Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 301–419.

Cases referred to

Abdullah Zawawi v PP [1985] 2 MLJ 16, SC (refd)

Balachandran v PP [2005] 2 MLJ 301, FC (refd)

Regina v Spurge [1961] 3 WLR 23, CA (refd)

Sun Kam Heng v PP [1992] 2 MLJ 826; [1993] 1 CLJ 109, SC (refd)

Tan Thang Sang v PP [1975] 1 MLJ 204 (refd)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985

Dangerous Drugs Act 1952 s 39B(2)

Evidence Act 1950 ss 114(g), 134, 137

Appeal from: Criminal Trial No 45A-28 of 2013 (High Court, Alor Setar)

Kit Soon Fong (Chew Jee San with him) (Kit & Assoc) for the appellant.

Ahmad Sazilan bin Abdul Khairi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zabariah Mohd JCA:

[1] This is an appeal by the appellant ('the accused') against the decision of the learned judicial commissioner in convicting the accused of an offence under s 39B(1)(a) and sentencing him under s 39B(2) of the Dangerous Drugs Act 1952.

[2] After hearing submissions from both parties and perusing through the appeal records, we found merits in the appeal. Unanimously, we allowed the appeal. The conviction and sentence was set aside. The accused is accordingly acquitted and discharged. Herein below are our grounds.

BACKGROUND

[3] On 12 December 2012, at or around 10.30pm, Sgt Mohd Yusof bin Ismail ('PW2') was on duty as supervisor in a police road block at Jalan Alor Merah towards Alor Setar, Kedah. At the material time PW2 was with six other police personnel, including Const Mohd Izzwan bin Mohd Isa ('PW4').

[4] At the said police road block, Const Awang Hasbi bin Awang Sabree detained a taxi, registration No KAQ3917 which was driven by PW9. At the material time the accused (who was an Iranian) was a passenger in the taxi at the

- A back seat. The taxi was ordered to stop at the side of the road. PW2 directed PW4 and Const Sivanesan a/l Supramaniam to inspect the taxi.
- B [5] PW4 then called upon PW2 and informed PW2 that he found two boxes of 'Kellogs Cornflakes' ('P15' and 'P16') which were wrapped in cellotape in a trolley bag ('P19') in the boot of the taxi. At that time the distance between PW2 and PW4 was about five metres. PW2 then went over to PW4 to inspect the two 'Kellogs Cornflakes' boxes found.
- C [6] When PW4 was holding the 'Kellogs Cornflakes' box ('P15'), the accused snatched the 'Kellogs Cornflakes' box ('P15') from PW4. The accused slit opened the cellotape of P15 using a key ('P28'). The accused then put his hand into P15 and took out what appeared to be substances in the form of crystals and put it into his mouth whilst saying 'eat sugar, eat sugar'. PW4
- D tasted the contents of P15, however found it to be bitter and suspected that it was drugs. It was in evidence that the accused could not converse well in English.
- E [7] Another bag ('P18') was found in the boot of the taxi. Nothing incriminating was found in P18. A laptop ('P21') was found in the back seat of the taxi.
- F [8] The accused and the items seized ('P15', 'P16', 'P19' and 'P21') were brought to the Police Station Kepala Batas at 11pm by PW4 together with Const Mohd Akmal bin Abdul Nasir, whilst PW2 remained manning the police road block until 11.20pm.
- G [9] Since the police personnel involved in the detention of the accused were inexperienced in detention and seizure of drugs, the Head of Police Station, Kepala Batas ('PW3') contacted the Department of Narcotics IPK, Kota Setar, Kedah to get help as to what is the course of action that needed to be done.
- H [10] Insp Farouk Fasha bin Bashah ('PW5') and his team came over to the Police Station Kepala Batas from the Department of Narcotics IPK Kota Setar. PW5 inspected the contents of P15 and P16 and suspected that it was drugs. PW5 then directed that the accused and the items seized to be sent to IPD, Kota Setar for further investigation.
- I [11] PW2 closed back the top part of P15 (which was opened earlier). He then handed P15 and P16 over to PW4 to be taken to IPD Kota Setar. PW4 together with Const Sutay Raghuwan, Const Awang Hasbi brought the accused and the items seized to IPD Kota Setar, whilst PW5 followed from behind, in another vehicle.

[12] According to PW4, at IPD Kota Setar, P15 and P16 was placed on the floor supervised by Const Sutay Raghawan. It was in IPD Kota Setar that P15 and P16 were handed over to the investigating officer ('PW6').

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THE ACCUSED'S GROUND OF APPEAL

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[13] The accused submitted that the learned judicial commissioner erred in law and fact when he failed to make a finding on the credibility of material prosecution witnesses which was clearly compromised.

[14] The learned judicial commissioner erred when he failed to invoke the adverse presumption under s 114(g) of the Evidence Act 1950 against the prosecution's case for failure to call material witness ie Const Mohd Akmal bin Abd Nasir and Const Sivanesan a/l Subramaniam.

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[15] Further, it was submitted that the judicial commissioner misdirected himself when he failed to appreciate that there are serious doubts relating to the identity of the drugs exhibits. The learned judicial commissioner ought to have held that the prosecution had failed to prove its case beyond reasonable doubt at the conclusion of the trial for the following reasons:

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- (a) there is a break in the chain of custody of the suspected drug exhibits and the suspected drug exhibits have been tampered with;
- (b) there are doubts relating to the movement of the suspected drug exhibits which form the subject matter of the charge; and
- (c) there is clear tampering of evidence which the prosecution failed to explain throughout the trial.

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FINDINGS

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[16] The defence submitted that the learned judicial commissioner erred when he ruled that there was no break in the chain of evidence despite acknowledging the existence of serious infirmities in the chain of custody of items seized, in his grounds of judgment at p 147.

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[17] It has been suggested by the defence counsel at the prosecution case that there were more than two boxes seized from the accused, at the time of his arrest. What was tendered in court was only two boxes ('P15' and 'P16') which allegedly contained drugs, which is the subject of the charge against the accused. The learned judicial commissioner found that PW2 had admitted in evidence that he did not see the number of boxes seized from the accused, however PW2 was aware that there were two other boxes seized from the accused and that there had been disciplinary action instituted against PW4 and Const Sivanesan a/l Subramaniam, ie the police personnel who were on duty at

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A the road block at the material time for taking these other two boxes.

[18] The learned judicial commissioner in his grounds of judgment stated that he had considered the evidence of the prosecution witnesses in relation to the handling of the exhibits concerned and was of the view that there was no break in the chain of evidence of the same. At p 146 of his judgment in appeal record Vol 2, the learned judicial commissioner said that P15 and P16 were seized by PW4 and it was the same P15 and P16 which were brought to the Police Station Kepala Batas, subsequently brought to IPK Kota Setar and finally handed over to PW6, the investigating officer. Hence, the learned judicial commissioner found that, as far as the two boxes ('P15' and 'P16') are concerned, there is no doubt that the accused was in custody and control of them. He concluded that, from the evidence of PW2, PW4, PW 6 and PW1, there has been no break in the chain of custody of the exhs P15 and P16, which led to his findings that the prosecution has proven its case of custody and control of these two boxes which were confirmed to contain the drugs, of which the accused has knowledge of. The relevant part of the judgment reads (appeal record Vol 2 at p 145):

E SP2 mengakui dia tidak melihat jumlah kotak yang telah dirampas dari Tertuduh tetapi mengakui dia tahu terdapat dua lagi kotak lain dan tindakan disiplin telah diambil terhadap SP4 dan seorang lagi anggota pasukan sekatan jalan raya (Konstabel Siva) kerana mengambil dua kotak lain tersebut.

F Saya juga telah pertimbangkan keterangan saksi-saksi pihak pendakwa mengenai pengendalian barang kes tersebut. Saya dapati berasaskan keterangan mereka tidak terdapat pemutusan rantaian keterangan dalam pengendalian barang kes yang terlibat.

...

G Berdasarkan keterangan SP2, SP4, SP6 dan SP1 saya dapati keterangan yang dikemukakan menunjukkan tidak ada pemutusan rantaian keterangan tentang pengendalian barang kes setakat yang berkait dengan kandungan P15 dan P16 ... Saya berpuas hati P15 dan P16 telah dirampas dari Tertuduh dan telah dijalankan analisis oleh SP1 dan barang yang sama juga telah dikemukakan di hadapan saya.

H [19] A perusal of the evidence of the investigating officer, PW6, shows that several police personnel who were involved in the road block on 12 December 2012 have been suspended from official duty as a result of the present case. Reason being there were more than two boxes seized from the accused from the boot of the taxi at the time of the road block, but only two boxes were handed to the investigating officer. The allegation against them was that they have taken the 'missing' boxes.

I [20] PW2 in his evidence acknowledged that a total of seven officers were arrested and later charged under the Dangerous Drugs (Special Preventive

Measures) Act 1985 for failure/tampering with the custody, control and management of the exhibits.

[21] PW2 further said in evidence that disciplinary action was also taken against him for failure to supervise his staff in the management of drugs exhibits. In cross-examination of PW2, (which was not rebutted) he agreed that there were more than two boxes seized from the accused and that he has no idea what happened to those missing boxes. PW2 also agreed in cross-examination that the items seized from the boot of the taxi was not supervised the whole time after it was seized at the road block. PW2 had directed Const Izzwan Md Isa ('PW4') and Const Akmal bin Abdul Nasir to keep watch over the seized items. However, subsequently it was found that these police personnel had taken some of the exhibits and sold it in open market.

[22] PW4 was called as a witness by the prosecution and his evidence was that, apart from some clothes and the two boxes found from the boot there were nothing else (refer to p 63 of the record of appeal Vol 1).

From the evidence, Const Akmal bin Abdul Nasir and Const Sivanesan a/l Subramaniam were also with PW4 at the road block when they seized the boxes from the accused, however Const Akmal bin Abdul Nasir and Const Sivanesan a/l Subramaniam were not called to support PW4's evidence with regards to what was actually seized.

[23] It is trite law that, where the evidence of a witness does not require to be corroborated in law, there is no need to tender corroborative evidence to support his testimony in court. Such requirement would be in conflict with s 137 of the Evidence Act 1950. This has been illustrated in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301 where it been held that:

Where the evidence of a witness does not require to be corroborated in law, there is no obligation to tender corroborative evidence to support his testimony. Thus, if the case for the prosecution rests solely on the evidence of one witness in such a category there is no requirement in law for his evidence to be corroborated. Any such requirement will conflict with s 134 of the Evidence Act 1950 which provides that no particular number of witnesses shall in any case be required for the proof of any fact. This mean that the testimony of a single witness, if believe, is sufficient to establish any fact.

However, as far as the present case is concerned, there is doubt as to how many boxes were seized by the police from the accused at the time of the road block.

[24] Throughout the trial, the prosecution has led evidence that PW4,

- A** Const Mohd Akmal bin Abdul Nasir and Const Sivanesan a/l Subramaniam escorted the accused together with the suspected drugs exhibits to the Kepala Batas Police Station. The accused has challenged the prosecution's version of events and suggested that Const Akmal bin Abdul Nasir and Const PW4 have tampered with the suspected drug exhibits when asked to escort the same to Kepala Batas Police Station. This can be seen in cross examination of PW2 at pp 37–38 of the record of appeal Vol 1 which reads:
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C Q: Mengambil kira jawapan kamu tadi, saya cadangkan bahawa terdapat lebih dari 2 bungkusan berisi bahan disyaki dadah dari beg-beg tersebut?

A: Setuju.

Q: Pada hal kamu tahu hasil siasatan dalam beg-beg tersebut ada lebih dari 2 kelogg Cornflakes box?

D A: Setuju.

Q: Setuju kamu tidak boleh memastikan apa yang terjadi pada kotak yang hilang tersebut?

A: Setuju.

E Q: Saya cadangkan bahawa barang kes yang dijumpai dalam boot tidak dikawal pada bila-bila masa selepas ia dirampas di kawasan roadblock ke Balai Polis Kepala Batas oleh kamu?

A: Setuju.

F Q: Barang-barang kes terutama 2 kotak kelogg cornflakes itu berada dalam milikan anggota-anggota kamu?

A: Setuju.

Q: Siapa yang jaga barang kes?

G A: Saya arahkan jaga barang kes dari tempat road block ke Balai Kepala Batas ialah Konst Izzuan dan Konst Akmal.

Q: Jika dari mana-mana dari mereka atau kedua-dua mereka mengganggu barang kes kamu tidak tahu kerana bukan dalam kawalan kamu?

H A: Setuju.

The defence has suggested that there were more than two boxes seized from the accused and PW4 insisted that they only seized two boxes and in cross-examination, he denied vehemently that there were more than two.

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[25] Since PW2 and PW6 have confirmed that there were missing exhibits, and that several police personnel have been suspended from duty in relation to the 'missing exhibits', then PW4 was not telling the truth as to the number of

boxes seized on that day. Hence PW4's credibility left much to be desired here. This aspect of the evidence of the prosecution witnesses was never considered by the learned judicial commissioner. There was no proper evaluation by the learned judicial commissioner on the testimony of the prosecution witnesses vis a vis PW2, PW4, PW6. Therefore, the findings of the learned judicial Commissioner that 'Berdasarkan keterangan SP2, SP4, SP6 ... saya dapati keterangan yang dikemukakan menunjukkan tidak ada pemutusan rantai keterangan tentang pengendalian barang kes setakat yang berkait dengan kandungan P15 dan P16 ...' is erroneous. It was a general all encompassing findings without any proper judicial analysis of the credibility of each of the witnesses to the issues raised by the defence ie the break in the chain of custody of the exhibits and the tampering of the same by the police personnel at the road block.

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[26] The prosecution had offered these two witnesses (Const Akmal bin Abdul Nasir and Const Sivanesan a/l Subramaniam) to the defence at the close of the prosecution's case. However, in view of the doubt created as to how many boxes were seized from the accused, these two witnesses, who were also on duty at the police road block, are crucial and material for the prosecution's case. They would be able to shed light on the issue of what happened to all the boxes of items seized from the boot of the taxi at the material time. It is insufficient for the prosecution to just offer them to the defence. In addition, there was no explanation at the prosecution's stage as to why these witnesses were not available or called as a witness. Failure to call these witnesses by the prosecution at the prosecution stage itself, creates gaps in the prosecution's case which is fatal to the charge against the accused (refer to *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16).

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[27] Consequently, the learned judicial commissioner should have invoked an adverse inference under s 114(g) of the Evidence Act 1950 against the prosecution's case ie that, these witnesses if called would tender evidence which is against the prosecution. The learned judicial commissioner erred when he did not do so.

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[28] It is unclear who exactly had custody and control of the drugs from the moment they were seized at the police road block, at the Kepala Batas Police Station, at the IPD Kota Setar and until finally it was handed over to PW6, the investigating officer. PW4 in his evidence was not sure who was involved in taking out the items seized from the accused, out of the boot of the taxi. Refer to notes of evidence at p 63 appeal record Vol 1 which reads:

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Q: Siapa yang ambil keluar semua kandungan dari dalam boot?

A: Sjn, saya dan lagi tidak ingat, angkat dan pindah ke boot MPV.

A [29] Throughout the trial, the prosecution has led evidence that PW4, Const Mohd Akmal bin Abdul Nasir and Const Sivanesan a/l Subramaniam escorted the accused together with the suspected drugs exhibits to the Kepala Batas Police Station. The accused has challenged the prosecution's version of events and suggested that Const Akmal bin Abdul Nasir and PW4 have tampered with the suspected drug exhibits when asked to escort the same to Kepala Batas Police Station. This can be seen in cross examination of PW2 at pp 37–38 of the record of appeal Vol 1 which reads:

C Q: Mengambil kira jawapan kamu tadi, saya cadangkan bahawa terdapat lebih dari 2 bungkusan berisi bahan disyaki dadah dari beg-beg tersebut?

A: Setuju.

D Q: Pada hal kamu tahu hasil siasatan dalam beg-beg tersebut ada lebih dari 2 kelogg Cornflakes box?

A: Setuju.

Q: Setuju kamu tidak boleh memastikan apa yang terjadi pada kotak yang hilang tersebut?

E A: Setuju.

Q: Saya cadangkan bahawa barang kes yang dijumpai dalam boot tidak dikawal pada bila-bila masa selepas ia dirampas di kawasan roadblock ke Balai Polis Kepala Batas oleh kamu?

F A: Setuju.

Q: Barang-barang kes terutama 2 kotak kelogg cornflakes itu berada dalam milikan anggota-anggotra kamu?

A: Setuju.

G Q: Siapa yang jaga barang kes?

A: Saya arahkan jaga barang kes dari tempat road block ke Balai Kepala Batas ialah Konst Izzuan dan Konst Akmal.

H Q: Jika dari mana-mana dari mereka atau kedua-dua mereka mengganggu barang kes kamu tidak tahu kerana bukan dalam kawalan kamu?

A: Setuju.

I [30] PW4 in his evidence when cross examined said that when he arrived at the Police Station at Kepala Batas, he placed the two boxes which he had seized from the accused on 'kaunter pertanyaan'. After that he went out to take the bags (refer to pp 64–65 of the record of appeal).

[31] Subsequently PW4 and his team met with PW3 and later PW5

(‘Insp Farouk’). Then PW4 was instructed to take the accused and the exhibits to the investigating officer, PW6 at the Narcotics Department at IPD Kota Setar (examination-in-chief of PW3 at p 48 Vol 1 of the record of appeal).

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[32] There was also uncontroverted evidence from cross examination of PW4 that several police personnel of the Narcotics Department of Kepala batas and/or IPD Kota Setar had physically handled or examined the ‘Kellogs cornflakes’ boxes (refer to p 65 Vol 1 of record of appeal) when PW4 said he saw ‘anggota-anggota narkotik periksa balik beg itu dan buka kotak-kotak’.

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[33] In addition, there is the evidence from the investigating officer (‘PW6’) who said that:

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Dimaklumkan pegawai tatatertib yang menyiasat kes anggota tersebut, dimaklumkan barang kes yang dijumpai semasa di tempat kejadian telah hilang sejumlah dari barang kes yang dirampas. Berapa jumlah tidak dimaklumkan. Tidak dijelaskan bentuk barang yang hilang pada malam itu.

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Despite doubts as to how many items seized were missing or what was missing, PW6 failed to do any investigation on the items that were ‘missing’ after it was seized from the accused. Hence it is incredible as to how the prosecution can submit that there has not been any tampering in the exhibits tendered in court. Moreover, PW6 was also unable to confirm what was the nature of the items that went missing. This part of the evidence of PW6 was not considered by the learned judicial commissioner. This issue on the tampering and missing exhibits has been raised from the initial stage of the prosecution’s case, it is thus incumbent upon the prosecution to disprove such notions (see *Tan Thang Sang v Public Prosecutor* [1975] 1 MLJ 204 at p 206; *Regina v Spurge* [1961] 3 WLR 23). It cannot be brushed aside and totally ignored, as what had happened in the present case.

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[34] The learned judicial commissioner failed to take into account the aforesaid factors which are crucial as it raises doubts on the identity of the drugs that were finally produced in court and erred in not taking into account the serious gaps in the prosecution’s case. A maximum evaluation of the testimony of the prosecutions’ witnesses (‘PW2’, ‘PW4’ and ‘PW6’) especially PW4 creates doubt on the credibility of the prosecution’s witnesses and doubts on the identity of the exhibits, of which defence of the case should not have been called in the first place. Edgar Joseph Jr SCJ in *Sun Kam Heng v Public Prosecutor* [1992] 2 MLJ 826; [1993] 1 CLJ 109 enunciated the principle that when there are doubts as to the identity of the exhibits, the conviction should be set aside, his judgment can be found at p 831 (MLJ); p 113 (CLJ) of the report:

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For the reasons stated, although it was utterly regrettable that the appellant should

A succeed in his appeal, the principle involved was more important than the case itself, and so, with considerable regret, we had no option but to allow the appeal, quash the convictions, set aside the sentences and record orders of acquittal and discharge. The public prosecutor will, no doubt, exercise his own discretion as to what action he thinks fit to take.

B CONCLUSION

C [35] From the aforesaid, the learned judicial commissioner erred when he failed to give a maximum evaluation of the testimony of the prosecution witnesses especially PW2, PW4 and PW6 at the end of the prosecution's case.

D [36] One cannot discount the missing exhibits and concluded that P15 and P16 were not tampered with. The fact that some of the items were missing suggests that the exhibits have been tampered with. The chain of custody of the exhibits have been questioned and the integrity of the contents of P15 and P16 have been compromised, indicating that it could have been tampered with. Clearly, the learned judicial commissioner has erred in his findings that there was no break in the chain of custody of the exhibits.

E [37] The failure to call certain witnesses created material gaps and doubts in the prosecution's case which is fatal to the prosecution's case and an adverse inference under s 114(g) should have been invoked against the prosecution's case.

F [38] We unanimously found that it was unsafe to retain the conviction of the accused. Unanimously, we allowed the appeal. The conviction and sentence was thereby set aside. The accused is acquitted and discharged.

G *Appeal allowed; conviction and sentence set aside; and appellant acquitted and discharged.*

Reported by Dzulkarnain Ab Fatar

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